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In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,

Petitioners,

vs.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AS AMICUS CURIAE OF THE NATIONAL CATTLEMEN'S ASSOCIATION AND THE CATL FUND IN SUPPORT OF RESPONDENTS

WILLIAM G. MYERS III
The CATL Fund
1301 Penn. Ave., N.W.,
Suite 300
Washington, D.C. 20004

Of Counsel

ROGER J. MARZULLA*
MICHAEL T. LEMPRES
LAURA M. REIFSCHNEIDER
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Ave. N.W., Suite 400
Washington, D.C. 20036
(202) 887-4000
Attorneys for Amici Curiae
**Counsel of Record*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Harm Regulation Takes the Private Property of Ranchers Without Just Compensation in Violation of the Fifth Amendment 4

A. The Government's Expansive Reading of the Endangered Species Act Violates Ranchers' Constitutional Rights to Use Their Private Lands 4

B. The FWS Routinely Prohibits Private Activity that It Interprets to be a "Take" Because the Activity Modifies Habitat that Might Support an Endangered Species 11

II. The Criminal Enforcement Provisions of Section 22 of the Endangered Species Act Demonstrate that Congress Did Not Intend Mere Habitat Modification Alone to Constitute a "Take." 21

CONCLUSION 26

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases:

Armstrong v. United States,
364 U.S. 40 (1960) 5

Bell Atlantic Telephone Cos. v. FCC,
24 F.3d 1441 (D.C. Cir. 1994) 10

Dolan v. City of Tigard,
114 S. Ct. 2309 (1994) 6

Florida Rock Industries v. United States,
18 F.3d 1560 (Fed. Cir. 1994),
cert. denied, 115 S. Ct. 898 (1995) 9

Fund for Animals v. Lujan,
Civ. No. 92-800 (D.D.C. Dec. 15, 1992) 7

Hendler v. United States,
952 F.2d 1364 (Fed. Cir. 1991) 9

Jarecki v. G. D. Searle & Co.,
367 U.S. 303 (1961) 12

Liparota v. United States,
471 U.S. 419 (1985) 24

Loretto v. Manhattan Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 6

Loveladies Harbor, Inc. v. United States,
27 F.3d 1545 (Fed. Cir. 1994) 10

Lucas v. South Carolina Coastal Council,
112 S. Ct. 2886 (1992) 2, 5, 6

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 10

Meyer v. Grant,
486 U.S. 414 (1988) 10

Palila v. Hawaii Department of Land and Natural Resources,
471 F. Supp. 985 (D. Haw. 1979),
aff'd, 639 F.2d 495 (9th Cir. 1981),
proceeding reopened, 649 F. Supp. 1070
(D. Haw. 1986), *aff'd*, 852 F.2d 1106
(9th Cir. 1988) 14, 15, 16

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 10

San Diego Gas & Electric Co. v. San Diego,
450 U.S. 621 (1981) 6

Sweet Home Chapter v. Babbitt,
17 F.3d 1463 (D.C. Cir. 1994) 11, 14

United States v. Billie,
667 F. Supp. 1485 (S.D. Fla. 1987) 22, 23, 24

United States v. International Minerals and Chemical Corp.,
402 U.S. 558 (1971) 24

United States v. Mills,
No. 89-3325 (11th Cir. May 15, 1990) 25

United States v. St. Onge,
676 F. Supp. 1044 (D. Mont. 1987) 22, 24

Whitney Benefits, Inc. v. United States,
926 F.2d 1169 (Fed. Cir.),
cert. denied, 502 U.S. 952 (1991) 9

U.S. Constitution:

U.S. Const. amend. V 5

U.S. Const. amend. XIV 5

U.S. Const. amend. IV 5

Statutes:

Endangered Species Act, 16 U.S.C. § 1531 *et seq.* 2

16 U.S.C. § 1532(19) 2, 21

16 U.S.C. § 1534(a)(2) 2, 10

16 U.S.C. § 1538(a)(1)(B) 2

16 U.S.C. § 1540(b)(1) 3, 22

Federal Regulations:

50 C.F.R. § 17.3 . . . . . 2, 13, 22, 23

Miscellaneous:

U.S. Dep't of Agriculture, Economic Research Service, *Agricultural Resources and Environmental Indicators*, (Dec. 1994) 4

U.S. Gen. Acct. Off., *Endangered Species Act Information on Species Protection on Nonfederal Lands* (Dec. 1994) 7, 22

Valley Communities, Inc., INV 3502 AN (U.S. Dep't of Interior, Office of the Solicitor, Civ. Penalty Proceeding, Notice of Assessment, Aug. 12, 1994) 14

STATEMENT OF INTEREST

The National Cattlemen's Association ("NCA") is the national spokesperson and issues manager for all segments of the U.S. beef cattle industry. The NCA represents more than 230,000 professional cattle breeders, producers and feeders, as well as 75 affiliated state and national associations. It is the only national grassroots organization that articulates policies on behalf of the single largest holders of private property in America -- the beef cattle industry. Through the NCA, cattlemen work to create positive business conditions and to maintain the land from which they make their living while providing consumers with the finest beef in the world. The CATL Fund was created to assist landowners and others similarly situated, including cattlemen, in establishing broad based legal precedent to protect property rights, promote free enterprise and minimize regulatory abuses. Together, amici seek to assist the Court in understanding how the regulation in question operates in practice to prevent this nation's ranchers from engaging in everyday agricultural activities, depriving them of the use of their lands and their collective ability to earn a living.

SUMMARY OF ARGUMENT

1. Ranchers use land to produce livestock and to make their living. Ranchers must carefully manage their land to permit its continuing use and individual ranchers must use large tracts of land to raise livestock. Because ranchers have not developed their property in the same way others have, ranch property contains a disproportionate amount of habitat that might be suitable for species listed as endangered, pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA").

a. The right to use land is entitled to substantial protection under the United States Constitution, and regulations which forbid the profitable use of private property require the property owner be compensated pursuant to the Fifth Amendment. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992).

b. The ESA itself provides for compensation to acquire property in furtherance of the goals of that Act. 16 U.S.C. § 1534(a)(2). Separately, the ESA prohibits the taking of any endangered species, and defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt" any such conduct. 16 U.S.C. §§ 1538(a)(1)(B) and 1532(19).

c. The Secretary of the Interior issued regulations defining "harm" for the purposes of the ESA to include significant habitat modification that significantly impairs essential behavioral patterns. 50 C.F.R. § 17.3. The Petitioners read the term "harm" so broadly as to render the term meaningless and to prohibit private activity on private property without regard to the actual presence of any endangered species on that property. The Department of the Interior has prevented private conduct through the threat of civil and criminal prosecution based on the "potential presence" of animals on property and the existence of habitat suitable for the species.

d. The government's prohibition on the use of private property constitutes a taking of that property under the Fifth Amendment and, in the absence of compensation, is prohibited by the Constitution.

2. Under the ESA's criminal provisions, 16 U.S.C. § 1540(b)(1), prosecutors must establish a "knowing" violation, but that knowledge is established by the "general intent" to commit an act. Thus, a rancher who intends to clear brush from his property commits a crime if that brush is later determined to constitute habitat critical to an endangered species.

Accordingly, amici request this Court to affirm the Circuit Court's invalidation of the habitat preservation regulation rendered in this case below.

ARGUMENT

I. The Harm Regulation Takes the Private Property of Ranchers Without Just Compensation in Violation of the Fifth Amendment.

No group in the country is as injured by this regulation as ranchers. Sixteen percent of the land mass of the United States is privately owned by ranchers -- approximately 371 million acres (larger than the collective size of twenty-two states).[1] The government's mere suspicion that a ranch may contain potential "habitat" for a listed species brings ordinary ranching activities to a screeching halt, to avoid a "take" as defined in the habitat preservation regulation. The government's suspicion need not even be based on the actual presence of any of the listed species on the property, for Petitioners define "injury" to the species to mean essentially "modification of habitat suitable for the species." Thus, the ESA's prohibitions against hunting, wounding or killing listed species are transformed into the taking of private property through a twisted interpretation of the single verb "harm." As numerous documented examples of actual applications of the harm regulation demonstrate, Petitioners have never considered this regulation to be "narrowly tailored"; rather, the government routinely rides roughshod over the Constitutionally protected rights of American ranchers.

A. The Government's Expansive Reading of the Endangered Species Act Violates Ranchers' Constitutional Rights to Use Their Private Lands.

Ranching is, quite simply, the use of land to produce livestock; without land, there is no ranching. Ranching requires that the land be carefully tended to produce water, hay, grass, fodder and other nutriment for livestock, and that erosion or other damage to the land be avoided. Ranching also sometimes requires the clearing of brush, the felling of trees, the building of fences,

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[1] U.S. Dep't of Agriculture, Economic Research Service, Agricultural Resources and Environmental Indicators, (Dec. 1994). This acreage is only the private pasture and range land of ranchers. The acreage is much larger when ranchers' associated crop land is included.

barns, stables and dwellings, and the introduction of other human activities upon the land. Ranching produces food and fiber and numerous byproducts which are essential to our daily lives. Ranching also occurs on vast tracts of rural and relatively undeveloped land, much of which might be suitable habitat for one or more endangered species.

The right to use land is entitled to substantial protection under the United States Constitution. The Constitution of the United States specifically mentions "property" in at least three provisions: the due process clause of the Fifth Amendment ("No person shall...be deprived of life, liberty, or property, without due process of the law..."), the takings clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"), and the due process clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law...."). The Fourth Amendment also protects property interests by ensuring "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." These provisions, taken together, underscore the belief of the writers of the Constitution that, unless the right to retain the fruit of one's labor be secure, the other liberties guaranteed by the Constitution are in jeopardy.

Accordingly, it is a founding principle of our nation that private land may not be taken for public use (unless it be purchased from the owner). This basic principle -- that the government must lawfully acquire private land rather than merely seize it -- is predicated upon fundamental notions of fairness. As this Court stated in *Armstrong v. United States*, "[t]he Fifth Amendment...was designed to bar Government from forcing some of the people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

Thus, a regulation which forbids the profitable use of land will be recognized as a violation of the Fifth Amendment, creating a duty on the part of the public as a whole to compensate the rancher who has been deprived of the reasonable use of his land. As the Court stated in *Lucas v. South Carolina Coastal Council*:

> ...[A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm...[a]s Justice Brennan explained: 'From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation...*San Diego Gas & Elec. Co., supra,* 450 U.S., at 652, 101 S. Ct., at 1304 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

112 S. Ct. 2886, 2894-95 (1992)

In *Lucas,* this Court noted that it has never set forth the justification for the *per se* rule that a regulation which deprives the landowner of all economically viable use violates the Fifth Amendment. *Id.* at 2894. "Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation...[F]or what is the land but the profits thereof[?]."

Or, as Justice Marshall stated in *Loretto v. Manhattan Teleprompter Manhattan CATV Corp.,* "[a]lthough deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking. . . it is clearly relevant." 458 U.S. 419, 436 (1982).

Moreover, the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure. As this Court recently stated in *Dolan v. City of Tigard,* "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much

a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation..." 114 S. Ct. 2309, 2320 (1994).

Because ranchers often own and use such vast tracts of land, they are disproportionately singled out to bear the burden of the habitat preservation regulation. Indeed, taken collectively, ranchers may own more endangered species habitat than any other class of Americans. Accordingly, the greatest part of the burden associated with preserving habitat necessarily falls upon ranchers and other private landowners. A recent report by the U.S. General Accounting Office ("GAO") determined that ninety percent of the 781 species that were listed as of May 1993, have habitat on nonfederal lands. Of these listed species, 517 have over sixty percent of their total habitat on nonfederal lands. Of the 105 species for which critical habitat has been designated, eighty have a portion of their critical habitat on nonfederal lands and forty-three of these have more than eighty percent of their critical habitat on nonfederal lands.[2]

Moreover, the threat to private landowners, including ranchers, is growing rapidly. Under a little-known legal settlement between the Department of the Interior and various environmental groups in 1992,[3] the Department obligated itself to drastically increase the numbers of species to be considered for listing as endangered or threatened. This agreement -- known in some circles as the "critter quota" -- has resulted in the actual listing of an average of one hundred species per year in the last three years, doubling the annual average number of listings in the pervious twelve years and has dramatically increased the acreage constituting habitat associated with those species. This listing frenzy is resulting in federal protection for an unforeseen number of species, well beyond the wildest dreams of the drafters of the ESA in 1973. It does not take a mathematician to calculate the ever-escalating cost to private property owners. When multiplied

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[2] U.S. Gen. Acct. Off., *Endangered Species Act Information on Species Protection on Nonfederal Lands* (Dec. 1994) ("GAO Report").

[3] *Fund for Animals v. Lujan,* Civ. No. 92-800 (D.D.C. Dec. 15, 1992).

against the myriad of everyday activities that are single-handedly swept within the scope of the ESA by virtue of the habitat preservation regulation at issue here, the equation spells disaster for private property owners generally and ranchers specifically. Contrary to the explicit command of the Fifth Amendment, these property owners are not receiving just compensation for the loss of their rights to use their property.

Nor is it a sufficient answer to suggest ranchers simply file "regulatory takings" suits against the federal government to recover the value of the land so taken. The scales of justice are unfairly tipped in favor of the government when ranchers are faced with the threat of losing the use of their land because of regulatory burdens imposed by the habitat preservation regulation. Not only are the laws drafted to ease the litigation burden of the government, but the costs of takings litigation can range in the hundreds of thousands or even millions of dollars, too high for the vast majority of ranchers to bear. Consequently, many ranchers, when faced with a government takings claim, cannot pursue their rights under the Fifth Amendment. The government, on the other hand, does not face a similar shortage of resources (at least in comparison to the individual property owner) and can often pursue a vigorous defense of the case without constraint. Adding to the hardship, procedural hurdles often bar litigation on the merits of takings claims for anywhere from five to ten years.

The following examples of reported cases demonstrate how arduous and interminable the litigation of takings claims against the federal government can be.

On October 2, 1980, Florida Rock Industries was denied a wetlands permit to mine limestone on its property in Southern Florida. In 1982 the company filed suit against the federal government alleging an unconstitutional taking. Following a 1985 judgment in the Company's favor, the government appealed and the case was reversed. In 1990, following another trial, the plaintiff again won, and the government appealed. Again, the case was reversed in 1994, and is now pending yet a third trial. More

than fourteen years after the original permit denial, the company is still waiting to be paid for the taking.[4]

In 1983 the federal government placed groundwater monitoring wells on land owned by Mr. Henry Hendler in Southern California, and issued various orders forbidding certain uses of the property. In September of 1984, Hendler filed suit against the federal government alleging a taking and, after five years of bitter litigation, the case was dismissed in December 1989. Hendler appealed, and the case was reversed by the Court of Federal Appeals in the Summer of 1991. The matter is now set for trial in 1995, more than twelve years after the government first physically invaded Hendler's property.[5]

In January 1979, Whitney Benefits Corporation, was denied a permit to mine coal on its land located in Wyoming. The company filed suit in the Claims Court in August 1983, and the case was dismissed the next year. In January 1985, the Court of Appeals reversed the dismissal and, following several years of litigation, the trial court entered judgment in favor of the plaintiff in October 1989. That judgment was affirmed in 1991, but has been followed by four more years of motions. Thus, more than sixteen years after the permit denial, Whitney Benefits has not yet received payment for the taking.[6]

In May 1982, Loveladies Harbor, Inc. was denied a wetlands permit to develop property it owned in New Jersey, and filed suit in the Claims Court in April 1983. After extensive litigation in both the Federal District Court and the Claims Court, plaintiff was awarded judgment in 1990. The government appealed, then moved to dismiss the appeal. Finally, in 1994, the Court of Appeals for the Federal Circuit affirmed the judgment for

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[4] *Florida Rock Indus. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995).

[5] *Hendler v. United States,* 952 F.2d 1364 (Fed. Cir. 1991).

[6] *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed. Cir.), *cert. denied,* 502 U.S. 952 (1991).

plaintiff -- more than twelve years after the original permit denial.[7]

A regulation which proscribes Constitutional and protected speech under the First Amendment will not be permitted to stand, *Meyer v. Grant*, 486 U.S. 414 (1988), nor will a regulation which violates constitutionally-protected freedom from unreasonable search and seizure, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). As the Court of Appeals for the District of Columbia Circuit recently recognized, a regulation likely to result in massive Fifth Amendment property rights violations must also be struck down. *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

Every bit as much as a regulation that restricts speech, the regulation of private property here must be held up under the strong light of Constitutional scrutiny; this Court must apply that scrutiny to determine whether or not the harm regulation "goes too far [and] will be recognized as a taking." The protection of endangered species may well be a highly laudable governmental goal; but, as Justice Holmes stated in the landmark decision, *Pennsylvania Coal Co. v. Mahon*, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for a change." 260 U.S. 393, 416 (1922). Indeed, Congress has provided the Secretary with authority to acquire endangered species reserves in Section 5 of the Endangered Species Act, 16 U.S.C §1534(a)(2); "the Secretary is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him." The Secretary cannot be permitted to accomplish through the back door of regulation that which he chooses not to accomplish through the front door of compensation.

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[7] *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994).

B. The Fish and Wildlife Service ("FWS") Routinely Prohibits Private Activity that It Interprets to be a "Take" Because the Activity Modifies Habitat that Might Support an Endangered Species.

The Petitioners' interpretation of "take" is so broad as to render the term meaningless. Operating in a world in which Lewis Carroll would feel comfortable, the Petitioners' twist the meaning of "actual killing or injuring wildlife" until civil and criminal exposure lie for disturbing habitat where a member of an endangered species could potentially seek food or shelter. This went too far for the Circuit Court, which invalidated the harm regulation in part because "the nine verbs accompanying 'harm' all involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks." *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994).

Petitioners take exception to this holding and attempt to convince the Court that the Secretary's definition of "harm" is a "carefully tailored regulation" that only prohibits modification of habitat that actually results in killing or injuring listed species. (Petitioner's Brief, at 16). When correctly understood, however, actually the FWS' regulation prohibits habitat modification that affects the "potential presence" of a member of an endangered species.[8] The true meaning of the regulation in question is

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[8] Letter from Brooks Harper, Office Supervisor, FWS, Southern California Field Station, to Michael F. Rowe, dated June 5, 1992 ("Rowe letter"). The text of the document is appended as Exhibit A. A copy of the original document is lodged with the Clerk of the Court under separate cover. The letter states, *inter alia,* the following:

> The Fish and Wildlife Service (Service) would like to advise you of the potential presence of the federally listed endangered Stephens' kangaroo rat . . . .

(continued...)

revealed by the way the Secretary routinely interprets that regulation in the field, supporting the Circuit Court's conclusion that the Secretary's definition of harm was neither authorized by Congress nor a reasonable interpretation of the ESA. 17 F.3d at 1464.

The Circuit Court avoided providing an improperly broad reading of the term harm by applying the doctrine of *noscitur a sociis*, which "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." 17 F.3d at 1465, *quoting Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The Circuit Court found the definition of harm to include "significant habitat modification or degradation . . [that] significantly impair[s] essential behavioral patterns" to be overly broad. 17 F.3d 1463-64. The court contrasted the broad interpretation given to harm with the specificity of the other nine accompanying verbs in the statute:

> With the single exception of word 'harm,' the words of the definition contemplate the perpetrator's direct application of force against the animal taken: 'harass, harm, pursue, hunt, shoot, wound, kill, capture or collect.' The forbidden

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[8](...continued)

> 'Harm' in the definition of 'take' in the Act . . . may include significant habitat modification or degradation where it actually kills or injuries wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering (50 C.F.R. 17.3).
>
> . . .
>
> Be advised that should you take endangered species or migratory birds you are liable for both State and Federal prosecution. The Service is forwarding this information to other appropriate agencies for their information and review.

> acts fit, in ordinary language, the basic model 'A hit B.'

17 F.3d at 1465.

Thus, the Circuit Court concluded that the FWS' broad definition of harm, which includes habitat modification, was so far reaching that it exceeded the authority Congress intended to provide in the ESA.

The Petitioners assert that the regulatory definition of harm is not so broad -- it "does not apply to habitat modification or degradation generally. It reaches only such acts that in turn actually kill or injure wildlife." (Petitioners' Brief at 20). They argue that the regulation's reference to habitat modification "merely elaborates on the basic definition in the first sentence [of 50 C.F.R. 17.3] by explaining its application in one particular context." (*Id.* at 21). They maintain that the phrase "actually kill or injure wildlife," is susceptible to many meanings because there is no real difference between "killing or injuring of protected wildlife where that consequence is brought about by the destruction of habitat essential for the wildlife's breeding, feeding, or shelter, rather than by other means, such as the discharge of a firearm or similarly direct application of force." (*Id.*) The Petitioners assert that an expansive definition of the regulation does not extend beyond the actual killing or injuring of wildlife and thus does not exceed the terms of the ESA:

> An action may result in the destruction or adverse modification of critical habitat, and yet not result in a taking of an endangered species because it does not 'actually kill or injure wildlife.' For example, where there is an area designated as critical habitat for a species but not currently inhabited by the species, a federal agency may be prevented . . . from . . . action in the area, such as the harvesting of trees that, if allowed to stand, would likely attain the attributes of suitable habitat

> for the species. Harvest of a similar area would not, however, be prevented by the Section 9 'take' prohibition.

(*Id.* at 42).

Properly understood, however, the Secretary's interpretation does extend the regulation beyond any common sense definition of killing or injuring wildlife. The FWS has relied on the broad definition of harm to repeatedly prevent exactly the type of action the Petitioners assert now would not be prevented by the Section 9 "take" prohibition. The FWS has consistently argued before lower courts that the harm regulation, properly read, does not require anything more than the disturbance of habitat that might be used by members of an endangered species. In this way, the FWS applies the harm regulation to private property without regard to whether the property is currently inhabited by a species.

The Petitioners continue to embrace and rely upon the Ninth Circuit's decision in *Palila v. Hawaii Department of Land and Natural Resources*[9] as the "proper" interpretation of the regulation.[10] In that case, the defendant was not alleged to have killed or injured a specific bird or even to have chopped down a tree that might have provided shelter or sustenance to the bird.

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[9] 471 F. Supp. 985 (D. Haw. 1979) ("*Palila I*"), *aff'd.*, 639 F.2d 495 (9th Cir. 1981) ("*Palila II*"), *proceeding reopened*, 649 F. Supp. 1070 (D. Haw. 1986) ("*Palila III*"), *aff'd.*, 852 F.2d 1106 (9th Cir. 1988) ("*Palila IV*").

[10] The FWS relied on *Palila* in administrative prosecution assessing damages of $300,000 for modifying habitat suitable for the Tipton Kangaroo rat by plowing the ground. *Valley Communities, Inc.*, INV 3502 AN (U.S. Dep't of Interior, Office of the Solicitor, Civ. Penalty Proceeding, Notice of Assessment, Aug. 12, 1994). Moreover, the FWS applied the habitat preservation rule despite the Circuit Court's ruling in *Sweet Home* because, "this ruling is not applicable in the Ninth Circuit." *Id.* at 7, n.1.

Instead, the defendant was found to violate the law by failing to prevent feral animals from eating shoots that could eventually grow into trees that could provide shelter or sustenance to certain endangered birds.

In *Palila I*, several interest groups brought suit, naming the Palila bird, a listed species, as plaintiff, claiming that the Hawaii Department of Land & Natural Resources's (the "Department") practice of maintaining feral goats and sheep within an area which had been designated as critical habitat for the Palila constituted a "take" in violation of ESA. The complaint alleged that because the feral goats and sheep ate the shoots and sprouts of the mamane-naio trees, they were suppressing the regeneration of the mamane forest upon which the Palila depends for food (in the form of seeds and pods) and shelter. The Department argued that any effect the feral goats and sheep had on the mamane forest and indirectly on the Palila was only a "potential" injury, and therefore did not fall within the harm regulation. The district court held that the Department's maintenance of feral goats and sheep constituted an illegal "take," reasoning that:

> By consuming the seedlings and shoots, the animals prevent regeneration of the forest, and thus bring about the relentless decline of the Palila's habitat.[11]

The Ninth Circuit affirmed the district court's interpretation of "harm" and the feral goats and sheep were removed from the management area.[12]

In 1984, the Sierra Club reopened the original proceeding to add the mouflon sheep as an animal destructive of Palila habitat. Relying on *Palila I* and *II*, the District Court enjoined the

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[11] *Palila I*, 471 F. Supp. at 990.

[12] *Palila II*, 639 F.2d 495.

Department from maintaining mouflon sheep in the management area, stating that:

> A finding of 'harm' does not require death to individual members of the species: nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.[13]

On appeal, the Government filed an *amicus curiae* brief in support of affirming *Palila III*.[14] The Ninth Circuit affirmed, noting that in both *Palila I* and *Palila III*, the district court defined harm "to include habitat destruction that could result in the extinction of the Palila. . . ."[15]

The Petitioners' continuing embrace of the reasoning in *Palila IV* is also shown by their reliance upon the case here, despite their assertion that the "narrowly tailored" regulation requires actual death or injury of a species, and by their decision to restrict the application of the D.C. Circuit's decision in this case. The Department of the Interior has specifically determined that, despite the finding of the D.C. Circuit here that habitat

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[13] *Palila III*, 649 F. Supp. at 1075.

[14] The Government took the position that the district court erred when it defined harm as including habitat modification that would only prevent or delay recovery of the Palila. *Palila IV*, 852 F.2d at 1108 n.4. Having found that the mouflon sheep's eating habits "could drive the Palila to extinction," *Id.* at 1108, the Ninth Circuit declined to address whether habitat degradation that merely retards recovery of the forest could constitute harm under the Secretary's regulation, *Id.* at 1110.

[15] *Palila IV*, 852 F.2d at 1108.

modification must kill or injure identifiable animals before it can constitute a "take" under the ESA, the Department follows the more expansive rule articulated in *Palila* to prosecute individuals in the Ninth Circuit.[16]

Out in the real world, the FWS uses its expansive definition of the harm regulation to forbid the disturbance of habitat that may potentially affect an endangered species. In June 1991, FWS sent letters to 550 ranchers, farmers and homeowners identified through a review of county property records as "owning property which may contain 'scrub' habitat, essential to [the Florida scrub jay]."[17] The FWS defined scrub habitat "as a sandy area which supports a dense, but often patchy, layer of woody shrubs, with little or no ground cover." This sandy area with woody shrubs is the "type of habitat that may be occupied by Florida scrub jays." The FWS then informed the residents of the prohibition of taking endangered or threatened species, provided the regulatory definition of "harass" and "harm," and made the following pronouncement:

> Harm is further defined as an act which actually kills or injures wildlife. It is the Service's position that destruction of scrub habitat will significantly affect this species.... As a landowner, you are responsible to ensure that actions carried out on your property are not harmful to the scrub habitat or listed species it supports.

Lykes Bros. letter.

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[16] *See* discussion at *supra* at p. 14, fn. 10.

[17] Letter from David J. Wesley, Field Supervisor, FWS, Jacksonville, Florida to Lykes Brothers, Inc., dated June 13, 1991 ("Lykes Bros. letter"). The text of the document is appended as Exhibit B. A copy of the original document is lodged with the Clerk of the Court under separate cover.

The letter, which was not limited to owners of land where the scrub jay actually was to be found, assured landowners that "[a]lthough this may appear to be a burden, there is a procedure to resolve this conflict." The procedures for resolution required the landowner to apply for and receive "take" permits under either Section 7 or Section 10(a) of the ESA. Thus, by verbal sleight of hand, the Secretary transformed "injury to the species" into "destruction of the scrub habitat," rendering such habitat modification an illegal "take" under the statute. *Id.*

Another Florida rancher received a letter from the FWS demanding the cessation of certain activities that had the "potential to impact Florida scrub jays."[18] There was no confirmation that scrub jays actually occupied or had ever occupied the property, but the rancher was prohibited from clearing land to plant some blueberry bushes for his personal, non-commercial use. The FWS stated:

> This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc. . . . This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

Merriman letter.

The letter informed the rancher of the procedure to seek a permit under Sections 7 and 10(a) of the ESA, and concluded with a warning:

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[18] Letter from David J. Wesley, FWS Field Supervisor, to Curtis W. Merriman, dated May 13, 1993 ("Merriman letter"). The text of the document is appended as Exhibit C. A copy of the original document is lodged with the Clerk of the Court under separate cover.

> 'Taking' a listed animal, such as the Florida scrub jay, without fulfilling the requirements of one of these two methods would violate the Act.

Id.

Accordingly, the FWS' broad interpretation of "take" required the landowner to obtain a "take" permit from the federal government for any land clearing activities that had the potential to impact Florida scrub jays, without reference or regard to whether any such scrub jays actually existed on the property. In this way, the FWS prohibited habitat modification that in no way "actually killed or injured wildlife" which might or might not be on the property. [Emphasis added.]

The Florida scrub jay experience represents the rule and not the exception. In Texas, for example, the potential to impact the golden-cheeked warbler is used to prohibit habitat modification on private property without regard to whether any golden-cheeked warblers inhabit or use the property. The FWS sent a letter to a landowner in a residential area near Austin, Texas, to inform her that her property "would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates."[19] Based on the belief that her land "would be suitable habitat" for endangered species, and without any indication that any endangered species actually used or existed on the land, the FWS informed the landowner that, "[w]e believe that clearing or land development-related activities of this acreage would constitute a 'take' as defined by Endangered Species Act." Krueger letter.

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[19] Undated letter from Sam D. Hamilton, FWS State Administrator to Marge Krueger, responding to her June 7, 1993 telephone call ("Krueger letter"). The text of the document is appended as Exhibit C. A copy of the original document is lodged with the Clerk of the Court under separate cover.

The FWS has even used the broad language of the habitat preservation regulation to prevent the development of land which would contribute to "encroaching urbanization" which, while not directly affecting any specific animal, would reduce the habitat adjacent to places where the golden-cheeked warbler has been sighted. A landowner seeking to develop his property was denied that right by the following interpretation of the harm regulation:

> Current biological information indicates that encroaching urbanization adversely affects the golden-cheeked warbler through habitat reduction, fragmentation, increase in certain predators, and other factors. Development of lots on Foxtree Cove, which are adjacent to one of the largest blocks of contiguous, occupied golden-cheeked warbler habitat remaining in Travis County, would contribute to the negative impacts mentioned above.[20]

Development of the above property was never shown to actually kill or injure wildlife, except under an elastic definition of those terms that equates encroaching urbanization generally with killing or injuring endangered species. Such a definition is so broad as to be both all encompassing and meaningless.

In California, the FWS acts to protect kangaroo rats by, *inter alia*, prohibiting the construction of a proposed fire break on privately owned land that had the "potential presence" of the Stephens' kangaroo rat. The FWS asserted, in a letter to the landowner, that construction and maintenance of the fire break would constitute significant habitat modification that actually killed

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[20] Letter from Sam D. Hamilton, State Administrator, to Lee Sherrod, dated July 25, 1991. The text of the document is appended as Exhibit E. A copy of the original document is lodged with the Clerk of the Court under separate cover.

or injured wildlife and would therefore violate the ESA.[21] In its letter to the landowner, the FWS stressed "that the Act provides for both civil and criminal penalties." The letter repeated the risk of criminal penalty by stating, "[b]e advised that should you take endangered species or migratory birds you are liable for both State and Federal prosecution." Thus the harm regulation is used by the FWS to threaten criminal prosecution against a landowner who seeks to construct a fire break on land on which kangaroo rats have not been identified, but which have the "potential presence" of those rats.

In this way, the government uses its tremendous resources to overwhelm individual ranchers, farmers and other holders of private property. The expansive definition it gives to the harm regulation permits the federal government to obtain the use of the private property of hundreds of thousands of American citizens without compensating the landowner.

II. The Criminal Enforcement Provisions of Section II of the Endangered Species Act Demonstrate that Congress Did Not Intend Mere Habitat Modification Alone to Constitute a "Take."

In enacting ESA Section 9(a)(1)(B), Congress declared it to be unlawful for any person to take any listed species and appended both civil penalties and criminal sanctions to punish knowing offenders. Understanding the need to identify explicitly the conduct that may subject violators to criminal liability, Congress did not leave the word "take" undefined. Rather, Congress specifically described the conduct that it intended to criminalize by setting forth a precise list of acts that would constitute an unlawful and potentially criminal take, i.e., "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."[22]

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[21] Rowe letter, cited *supra*, at n.8.

[22] 16 U.S.C. § 1532(19).

A rancher knows when he has harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured or collected an animal. He is aware that he may be fined or even go to jail if the animal that is the object of any of these actions is a listed species. A rancher also knows when he has erected a fence to contain his animals, cleared a pasture of brush or trees, plowed a field to plant a feed crop for his cattle or a vegetable garden for his family. What he does not know -- because Congress did not intend it to be so -- is that these seemingly beneficial acts in furtherance of his ranching activities constitute a felony if the land, trees or vegetation in question happen to be a habitat which might support an endangered species -- even if it has never been seen on his ranch.

His concern about criminal prosecution under the Endangered Species Act is not hypothetical. From 1988 through 1993, the U.S. Fish & Wildlife Service completed prosecution of 86 criminal cases involving the alleged illegal taking of a listed species on non-federal land. These cases resulted in the imposition of fines ranging from $25 to $50,000 in 59 instances and jail sentences ranging from 10 to 1,170 days in 33 instances. During this same period of time, FWS law enforcement officials have initiated 321 investigations of alleged takings of listed species on private property and one hundred criminal prosecutions. *Seven of these convictions were based solely upon modification of habitat.*[23]

Violations of the Endangered Species Act are essentially prosecuted as strict liability crimes. Section 11 of the Act, 16 U.S.C. §1540(b)(1), provides that "any person who knowingly violates...any regulation [including 50 C.F.R. § 17.3...] shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both." This provision does not require that the defendant know that he is violating the regulation; rather, it is a "general intent" criminal provision which merely requires that the defendant knowingly commit the act which

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[23] GAO Report, at 11-13.

constitutes the violation. For example, in *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1987), the court rejected defendant's motion to permit him to introduce evidence that he thought he was shooting a non-endangered elk rather than an endangered grizzly bear. Citing the holding in *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987), the court refused the proffered instruction, finding instead that Section 11 is more properly understood to impose a "general intent" requirement:

> This construction of the 'knowingly' requirement would best give effect to the regulatory and protective nature of the Act. The purposes of the Endangered Species Act would be thwarted if the court were to adopt the defendant's construction of the Act. The critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting. The scienter element applies to the act of taking; thus, defendant could only claim accident or mistake if he did not intend to discharge his firearm, or the weapon malfunctioned, or similar circumstances occurred. Given the regulatory nature of the Act, and its broad purposes to protect listed species, the government cannot be required to prove that he had the specific intent to take a grizzly bear.

For the rancher engaged in planting grass seeds, clearing land, removing weeds, felling trees, running cattle or building fences, 50 C.F.R. § 17.3 simply means that these acts, if they modify habitat appropriate for any one of a thousand endangered species, constitute felonies punishable by federal imprisonment. It is no defense to argue that he did not know that the brush, trees or grasslands in question were habitat for an endangered species, for modification of the habitat constitutes the "take" under the regulation here at issue.

Nor, ironically, does any member of the species have to be harmed in any way for the rancher to be prosecuted. Under

the habitat preservation regulation it is the modification of the habitat (whether or not an individual specimen of the species occupies or has ever used the land in question) which constitutes the "take." Thus it is the modification of the habitat, even if no member of the species is present, which constitutes "injury to the wildlife" -- and is a felony under this regulation. Such strict criminal liability for perfectly innocent and ordinary ranching activities does not pass Constitutional muster under the due process clause. As this court stated in *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, 564-5 (1971), a case upholding the general intent requirement for persons engaged in inherently dangerous activities: "Pencils, dental floss, [and] paper clips may also be regulated. But they may be the type of product which might raise substantial due process questions if Congress did not require...*mens rea* as to each ingredient of the offense."

Thus, the fact that Congress did intend that a "take" of an endangered species be prosecuted as a general intent crime in order to carry out the purposes of the Act strongly argues that Congress never intended that the Secretary also define as a "take" (and thus a felony) the mere modification of habitat where no member of the species is harmed or injured in any way. To interpret the statute as the Secretary has in the habitat preservation regulation is to establish a criminal penalty for innocuous, productive -- yes, and constitutionally-protected -- activities. *See, e.g., United States v. Billie*, 667 F. Supp. 1485, and *United States v. St. Onge*, 676 F. Supp. 1044. This absurd result is avoided, however, by upholding the determination of the court below that this regulation lies outside the authority granted to the agency by the Endangered Species Act.

The United States' system of criminal law expresses citizens' commonly held view that the commission of certain acts justifies the unleashing of governmental power to prosecute, fine and imprison the offender. This popular consensus is expressed through the enactment of statutes by Congress and the presentation of duly enacted laws to the President for signature. Thus, "[t]he

definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely the creatures of statute."[24] The duty to capture popular consensus in criminalizing certain conduct remains at all times both the privilege and the obligation of the legislature. As Judge Vinson recently observed in *United States v. Mills*,[25] "a delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an unelected administrative agency such as the Corps of Engineers, does violence to this time-honored principle." Had Congress intended the modification of potential habitat for endangered species alone to constitute a crime, due process would, (at a minimum) require that the government, in a criminal case, prove that the defendant knowingly destroyed what he knew to be habitat for an endangered species. Like the dog who did not bark in the famous Sherlock Holmes story, Congress' silence in omission of such a provision proves that it did not intend mere habitat modification alone to be prohibited as a "take."

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[24] *Liparota v. United States*, 471 U.S. 419, 424 (1985).

[25] No. 89-3325 (11th Cir. May 15, 1990).

CONCLUSION

For the foregoing reasons, the judgment below of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

March 24, 1995 Respectfully submitted,

ROGER J. MARZULLA*
MICHAEL T. LEMPRES
LAURA M. REIFSCHNEIDER
AKIN, GUMP, STRAUSS,
HAUER & FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

**Counsel of Record*

WILLIAM G. MYERS III
The CATL Fund
1301 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC 20004

Of Counsel

APPENDIX

Exhibit A

United States Department of the Interior
FISH AND WILDLIFE SERVICE

FISH AND WILDLIFE ENHANCEMENT
SOUTHERN CALIFORNIA FIELD STATION
Carlsbad Office
2730 Loker Avenue West
Carlsbad, California 92008

June 5, 1992

Mr. Michael F. Rowe
P.O. Box 507
Winchester, California 92596

Dear Mr. Rowe:

The Fish and Wildlife Service (Service) would like to advise you of the potential presence of the federally listed endangered Stephens' kangaroo rat (Dipodomys stephensi) and also the potential presence of nesting birds protected under the Migratory Bird Treaty Act on the Domenigoni property in the vicinity of your proposed fire break.

It is my understanding that Mr. Davenport of my staff, and Special Agent Petrula of the Division of Law Enforcement, spoke with you regarding potential endangered species conflicts relating to your proposed fire break. I would further like to notify you that there could be an impact on nesting migratory birds. I am

providing the following information on the Endangered Species Act and the Migratory Bird Treaty Act to provide you with clarification of these federal laws.

The Endangered Species Act states that ". . . it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States. . ." (16 USC 1538(a) (1) (B)).

"Person" is defined by the Endangered Species Act (Act) as an individual, corporation, partnership, trust, association or any private entity; or any officer, employee, agent, department or instrumentality of the Federal Government, of any state, municipality or political subdivision of a state; or any other entity subject to the jurisdiction of the United States. "Take" as defined by the Act means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt to engage in any such conduct. It should be noted that the Act provides for both civil and criminal penalties.

Furthermore, "take" in the Act as defined includes the terms "harm" and "harassment". "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such action may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering (50 CFR 17.3).

Additionally, "harass" in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering (50 CFR 17.3).

The Migratory Bird Treaty Act states that ". . . it shall be unlawful at any time, by any means or in any manner, to pursue,

hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird . . ." (16 USC 703). "Take" means to pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture or collect. "Migratory bird" means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in 50 CFR 10.13, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird . . . .

Be advised that should you take endangered species or migratory birds you are liable for both State and Federal prosecution. The Service is forwarding this information to other appropriate agencies for their information and review.

It is my understanding that you have been unwilling to cooperate with the Service in resolving this matter in a legal manner. Potential methods exist to reduce fire hazards without taking endangered species or nesting migratory birds. An example would include mowing the site and removing debris rather than discing. I would like to emphasize that the Service appreciates your concern and we remain willing to work with you to resolve any conflicts.

If you have any questions or would like additional information, please contact Art Davenport of this office at (619) 431-9440. Special Agent Petrula can be contacted at (310) 297-0062.

Sincerely,

[s/]Brooks Harper
Brooks Harper
Office Supervisor

cc: Diane Petrula, FWS Law Enforcement, Gardena Office

Exhibit B

United States Department of the Interior
FISH AND WILDLIFE SERVICE
3100 UNIVERSITY BLVD. SOUTH
SUITE 120
JACKSONVILLE, FL 32216

[JUN 13 1991]

Lykes Brothers, Inc.
P.O. Box 1690
Tampa, Florida 33601

Dear Gentlemen:

The U.S. Fish and Wildlife Service (Service), in its effort to protect the Florida scrub jay, has been reviewing property records in Highlands County. As a result of the review, you have been identified as owning property which may contain "scrub" habitat, essential to this species. Scrub is defined as a sandy area which supports a dense, but often patchy, layer of woody shrubs, with little or no ground cover. Typical plants which grow here include sand live oak, myrtle oak, inopine oak, and Chapman oak, along with saw palmetto, scrub palmetto, scattered sand pine, and rosemary. This type of habitat may be occupied by Florida scrub jays, a federally listed threatened species. Two other threatened species which may occupy this habitat are the sand skink and the blue-tailed mole skink, which are small lizards.

The Florida scrub jay (*Aphelocoma coerulescens coerulescens*) is a unique bird subspecies found only in Florida. It is located primarily within your area (the Lake Wales ridge) and portions of the east and west coasts of central and south Florida. The scrub jay is threatened by extinction because of habitat

destruction resulting from agriculture conversion, commercial and residential development, or other uses that result in the destruction of scrub habitat.

The Florida scrub jay is protected by the Endangered Species Act of 1973 (Act), and by regulations published in the Code of Federal Regulations. Under the Act, there is a section that protects endangered and threatened species from human impacts. This section, entitled "Illegal Acts," prohibits the "take" of endangered or threatened species. Take is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harass is defined as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Harm is further defined as an act which actually kills or injures wildlife. It is the Service's position that destruction of scrub habitat will significantly affect this species. Therefore, any activity that destroys scrub occupied by scrub jays may violate the Act. As a landowner, you are responsible to ensure that actions carried out on your property are not harmful to the scrub habitat or the listed species it supports.

Although this may appear to be a burden, there is a procedure to resolve this conflict. Under the Act, there are two ways private landowners wishing to develop their land can legally "take" a threatened or endangered species, like the scrub jay. The first is through Section 7 of the Act, which is used if any federal permit, authorization, or funding is received to develop the property. In some cases, this involves a permit for wetland fill by the U.S. Army Corps of Engineers, loans through the Federal Housing Administration, or any other similar federal action.

The second alternative is described in Section 10(a) of the Act. In this instance, a permit authorizing "take" can be issued by

the Service, provided the applicant accomplishes appropriate conservation measures for habitat protection prior to development activity. The conservation measures are outlined in a document called a Habitat Conservation Plan (HCP), which is a mandatory component of any Section 10(a) permit for taking. An HCP must show that 1) the taking is incidental, 2) impacts to the species will be held to a minimum and unavoidable impacts mitigated, 3) there must be adequate funding for the plan, 4) the taking will not jeopardize the continued existence of the species, and 5) other site specific needs that may develop on a case by case basis.

The Service is interested in developing an HCP for the Florida scrub jay in your area. If you have scrub habitat which you plan to change in some way, you should contact this office for further information on how to get a permit to authorize "take" of scrub jays, or how you may participate in the HCP process. If you have any questions, please call me or Dawn Zattau at 904-791-2580.

These conservation measures are necessary to protect the Florida scrub jay from the possibility of extinction. Because the birds are so dependent on this type of habitat, adequate scrub must be protected from further development to insure the bird's long-term survival. Your cooperation is very much appreciated.

Sincerely yours,

[s/]David J. Wesley
David J. Wesley
Field Supervisor

Exhibit C

United States Department of the Interior

FISH AND WILDLIFE SERVICE
3100 University Blvd. South
Suite 120
Jacksonville, Florida 32216
[MAY 13 1993]

CERTIFIED MAIL

Curtis W. Merriman
319 East Main Street
Avon Park, FL 33825

Dear Mr. Merriman:

This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc., bordered on the west by Highway 64 and on the south by Laflam Road, in Highlands County. This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

In accordance with the Endangered Species Act of 1973, as amended (Act), only two avenues are available to legally "take" a listed species, such as the scrub jay. "Take," as defined in the Act, means "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." One avenue is through the Section 7 consultation process using the Incidental Take statement in the Biological Opinion. In order to use the Section 7 process, a Federal agency must be involved in the project. If a Federal

agency is not involved, the other method available is obtaining a Section 10(a)(1)(B) permit by developing a Habitat Conservation Plan in accordance with Section 10 of the Act. "Taking" a listed animal, such as the Florida scrub jay, without fulfilling the requirements of one of these two methods would violate the Act. I have enclosed copies of the Act and the Section 10 regulations for your information.

We recommend you contact Dawn Zattau, of my staff, to determine if "take" will result from your project. The number is 904-232-2580.

Sincerely yours,

[s/] David J. Wesley
David J. Wesley
Field Supervisor

Enclosures

Exhibit D

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

Lot in Jester Point, Phase I, or 7101
Foxtree Cove,
Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a

federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

[s/] Joseph P. Johnston
[for]Sam D. Hamilton
State Administrator

Exhibit E

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011
July 25, 1991

Mr. Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, TX 78716

Dear Mr. Sherrod:

This letter is in reference to the remaining undeveloped lots (Block D, lots 15-28; 31; 33-37) on Foxtree Cove, Jester Estates subdivision, Travis County, Texas. In our initial review of this property, we determined, by letter dated July 16, 1990, that clearing of these lots could result in a violation of Section 9 of the Endangered Species Act. In a letter dated June 28, 1991, you requested that we alter our previous determination and concur with your assessment that development of these lots would not adversely impact the golden-cheeked warbler. Surveys conducted in 1990 and 1991 found no suitable habitat for the black-capped vireo or the cave invertebrates, but warblers were observed on either side of Foxtree Cove in 1990, and to the south in 1991.

Current biological information indicates that encroaching urbanization adversely affects the golden-cheeked warbler through habitat reduction, fragmentation, increase in certain predators, and other factors. Development of the lots on Foxtree Cove, which

are adjacent to one of the largest blocks of contiguous, occupied golden-cheeked warbler habitat remaining in Travis County, would contribute to the negative impacts mentioned above. Since warblers have been observed throughout the entire habitat block in 1991 and previous years by your firm and other biologists, we continue to believe that further intrusion into this habitat block could result in a "take" as defined by the Endangered Species Act. Thus, a Section 10(a) permit would be necessary to develop lots 15-28 and 33-37.

However, since Lot 31 is located between existing homes, we believe that development of this lot would not be in violation of Section 9 of the Endangered Species Act. We recommend, though, that clearing and other activities related to development on this lot be restricted to the front 100 feet from the edge of the roadway, and that exterior construction activities not occur between March 15 and August 1.

Thank you for providing pertinent information in this review. If you have any questions or wish to discuss this matter further, please contact Lisa van Hulsteyn at 817-885-7830.

Sincerely,

[s/]Robert M. Short
Robert M. Short
Field Supervisor

cc: City of Austin, Environment and Conservation
Services Department, Austin, TX